Supreme Court, U.S.
FILED
APR 18 2003
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No. 02-1370

In The

Supreme Court of the United States

S.P.,

Petitioner,

v.

V.T., E.T., and W.T.M.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Civil Appeals Of Alabama

BRIEF IN OPPOSITION

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PARTIES

Corrections regarding the parties listed by the Petitioner is as follows:

Respondent, William Thomas Mason, the father of A.M.A., was not a Petitioner in the opinion at issue but was a party.

Respondent, Eugene Trosch, one of the current legal custodians of the child, has been treated as a party by every state court in this matter though he did not formally intervene as a party in the initial petition with his wife.

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REASONS FOR DENYING THE WRIT

This case, *W.T.M. v. S.P. and V.T. and E.T. v. S.P.*, 2002 WL 1003927 (2002), hereinafter referred to as *W.T.M. III*, was decided under state law. No federal question, federal statute, federal requirement relative to any state court and no private cause of action arising from any federal law are involved in this case. Accordingly, the Petition for Writ of Certiorari should be denied.

The Alabama Supreme Court denied certiorari due to Petitioners failure to comply with mandatory provisions of the Alabama Rules of Appellate Procedure. Petitioner's statements regarding the discretionary review are misleading, as the Alabama Supreme Court has no discretion to review petitions improperly before the Court.

1. There Is No Basis For The Jurisdiction Of This Court.

In the Petition for Writ of Certiorari to this Court, the Petitioner states, "The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a)". (Pet. Cert. at 2) 28 U.S.C. § 1257(a) provides for certiorari from "Final judgments or decisions rendered by the highest court of a state in which a decision could be had . . . " There was no such judgment or decision in this case. The highest court in this case is the Supreme Court of Alabama. The Petition for Writ of Certiorari to the Supreme Court of Alabama was " . . . denied for failure to comply with Rule 39(d)(2), (d)(3), (d)(4) and (d)(5), Alabama Rules of Appellate Procedure."

The Supreme Court of Alabama, with one exception, has always strictly and regularly followed this "procedural bar". The exception is an advisory opinion concerning a case pending in the Court of Civil Appeals in 1989, where

Alabama Legislature was in special session and the governor requested an advisory opinion. The Supreme Court of Alabama granted an advisory opinion without a Petition for Writ of Certiorari being filed. "Our exercise of this power is necessitated by your (the governor's) request and by the special legislative session that has been called to address the fiscal emergency created by the declaration in *White*, (See; *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989) *infra*) of the unconstitutionality of the corporate franchise tax, Alabama Code § 40-14-40 and 40-14-41." *Opinion of the Justices,* No. 330, 558 So.2d 390, 391 (Ala. 1989). The *Opinion of the Justices* appears to be the only case where the Supreme Court of Alabama has not strictly followed the requirements of Rule 39, Ala. R. App. P.

Petitioner cites *Ex parte Hails,* 814 So.2d 988, 990 (Ala. 2001) for the proposition that compliance with Rule 39, Ala. R. App. P. is not required. That statement of authority is misplaced as the quotation is from the dissent. The Petition for Writ of Certiorari in *Hails, id,* was denied for failure to comply with the provisions of Rule 39, Ala. R. App. P. *id.*

Petitioner also cites *Ex parte Hunte*, 436 So.2d 806, 810 (Ala. 1983) where there is the statement that the opinion that, while reversing the Court of Criminal Appeals found " . . . that it was not necessary to deal with the state's contention that the petitioner had not complied with Rule 39." (Pet. Cert. at 3) *Hunte, id,* had nothing to do with the procedural bar, as the Petition in *Hunte* complied with the requirements of Rule 39, Ala. R. App. P. *Ex parte King,* 797 So.2d 1191, 1194 (Ala. 2001) is also cited but was a case where there was compliance with

Rule 39, Ala. R. App. P. and the Petition for Writ of Certiorari was granted.

Three cases decided by this Court are cited by Petitioner for the proposition that " . . . a state procedural ground is not 'adequate' unless the procedural rule is strictly or regularly followed.'" (Pet. Cert. at 2) The first cases cited are *N.A.A.C.P. v. Alabama*, 357 U.S. 449 (1958) and *N.A.A.C.P. v. Alabama*, 377 U.S. 288 (1964). Both of these cases arose out of the same set of facts, both had to do with the State of Alabama and the efforts of the state government to use the power of the State to drive the N.A.A.C.P. out of the State. In both N.A.A.C.P. cases, Rule 39 was complied with, and the Petition denied on grounds that were unrelated to the procedural grounds of Rule 39, Ala. R. App. P.

The third case cited by the Petitioner is *Hathorn v. Lavorn*, 457 U.S. 255, 263 (1982). *Hathorn* was another pretext case where this Court held "State courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to all similar claims." It was held by this Court in *Hathorn*, that there was no "independent and adequate" basis for the ruling by the Mississippi Court, which Court had wrongly invoked the procedural bar.

The Supreme Court of Alabama applies the requirements of Rule 39, Ala. R. App. P. in a manner that is strictly and regularly followed, without any pretext.[1] There

[1] See e.g. *Lindsay v. State*, 125 So.2d 725 (Ala. 1960), *Brannan v. State*, 139 So.2d 351 (Ala. 1962), *Ex parte Save Our Streams*, 541 So.2d 549 (Ala. 1989), *Ex parte Winchester*, 544 So.2d 967 (Ala. 1989), *Ex parte Jackson*, 551 So.2d 304 (Ala. 1989), *Ex parte Hails*, 814 So. 2d 988 (Ala.

(Continued on following page)

was no unusual or obscure procedural device in this case, merely the ordinary and regular application of Rule 39 Ala. R. App. P. There was no review by the highest court of the State, and there are no grounds to justify granting this Petition For Writ Of Certiorari.

2. Child Custody Determination Is a Matter of State Law.

Petitioner asserts "The Alabama Court's Decision Conflicts with Decisions of Other State Courts." (Pet. Cert. at 14) There are narrowly defined circumstances where federal jurisdiction is necessary to resolve conflicts in custody cases. This case is not one of them. The Parental Kidnapping Protection Act of 1980, 28 U.S.C. § 1738A is one of those circumstances. Federal jurisdiction is also appropriate where there are conflicting state custody determinations, as was the case in *Hickey v. Baxter,* 800 F. 2d 430, 431 (4th Cir. 1986). A similar situation exists in cases concerning The Hague Convention, and the substantive federal law pursuant to 42 U.S.C. § 11603. *Zajackowski v. Zajackowski,* 932 F.Supp. 128, 130 (D.Md. 1996).

A strikingly similar factual situation was discussed in an application for stay in *Deboer v. Deboer,* 509 U.S. 1301, 114 S.Ct. 1, 125 L.Ed.2d 755 (1993). Justice Stevens wrote:

> "Neither Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they might

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2001), *Ex parte Allen,* No. 1012141, 2002 WL 31439754 (Ala. Nov. 1, 2002).

> be better able to provide for her future and her education. As the Iowa Supreme Court stated: '[C]ourts are not free to take children from parents simply by deciding another home offers more advantages.' (Internal citations omitted)
>
> My examination of the opinions in the litigation persuades me that there is no valid federal objection to the conduct or the outcome of the proceedings in the Iowa courts." *Id* at 509 U.S. 1301.

The stay was denied.

There is no compelling federal jurisdictional issue involved in this case. There is no federal statute at issue, and no federal question involved in this custody determination. The Alabama Legislature passed legislation which was enacted into law, and which the Alabama court followed, as is the duty of the Alabama court. Courts of other states have the duty to follow the statutory law enacted by their legislatures. While there may be differences in the state statutes, and differences in state court opinions, this conflict does not present a federal question.[2]

There is no basis for federal jurisdiction in this child custody case; therefore, the Petition for Writ of Certiorari should be denied.

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[2] *See* Judge Leonard P. Edwards, *Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980,* "Resource Guidelines, Improving Court Practices in Child Abuse & Neglect Cases", published by the National Counsel of Juvenile and Family Court Judges, Reno, Nevada, 1995.

3. The Opinion In *W.T.M. III* Is Based On State Law.

Petitioner contends that the Court of Civil Appeals of Alabama relied upon federal law, and argues how the provisions of federal statutes should be interpreted. The opinion of the Court of Civil Appeals of Alabama, in *W.T.M. III* is clearly based upon State law. The dispositive statement in the opinion of the Court of Civil Appeals being "In the present case, DHR (the State Department of Human Resources) recommended, pursuant to 12-15-62(c) – and consistent with the mandate of 42 U.S.C. § 675(5)(E)(i) – that the child be placed with V.T. and E.T., her paternal aunt and uncle." (Pet. Cert. App. at A-11)

The opinion was based on Alabama statutes, the recommendation of the State Department of Human Resources, and the testimony and evidence presented at trial.

> We hold that the juvenile court erred by determining that it was in A.M.A.'s best interest to be placed in the custody of her foster mother, S.P.
>
> The juvenile court's factual findings – that S.P. had physical custody of the child for 3-1/2 years, that S.P. had provided the child with a loving and nurturing environment, and that S.P. had given the child excellent care – are fully supported by the record. However, those factual findings are insufficient as a matter of law, to overcome the statutory policies and preferences expressed in § 12-15-1.1 and § 12-15-62(c), Ala. Code 1975.
>
> Section 12-15-1.1 states, as a legislative goal for the juvenile court, that the court should "preserve and strengthen the child's family whenever

> possible" and should maintain "a preference at all times for the preservation of the family." See § 12-15-1.1(1) and (8). Section 12-15-62(c) states a preference for placing a dependent child who has been in long-term foster care with a relative over an unrelated caregiver. *W.T.M. III* at 3.

In reversing the trial court, the Alabama Court of Civil Appeals stated, "Given the father's limitations, awarding custody of the child to the paternal aunt and uncle is the nearest approximation to a real parent-child relationship possible for W.T.M. and A.M.A." *W.T.M. III* at 5.

There are two references to federal law in the opinion. The first reference explains a rationale for the passage of Alabama statutory law, and specifically to 12-15-62 and 12-15-65, Ala. Code, 1975. The other is a statement that Alabama law is " . . . consistent with the mandate of 42 U.S.C. § 675(5)(E)(i). (Pet. Cert. App. at A-11)

The dissent in *W.T.M. III* is the only place where any "reliance" is mentioned. "The main opinion also relies upon 42 U.S.C. §§ 671(a) and 675, part of the federal Adoption and Safe Families Act of 1997. These federal statutes do not purport to prescribe rules of decision for state courts and dependency cases." (Pet. Cert. App. at A-32)

The opinion of the Court of Civil Appeals of Alabama is based upon the law of Alabama. There is no federal issue to be determined in this case.

4. Petitioner Failed To Present Any Federal Issues To Any Alabama Court.

Petitioner did not argue, or present any evidence, concerning any federal question during the trial of the

case. On appeal, Petitioner did not argue any federal question to the Court of Civil Appeals of Alabama. Petitioner did argue federal law in the brief on the merits in her Petition for Writ of Certiorari to the Supreme Court of Alabama, but she did not properly perfect her appeal, and the Petition for Writ of Certiorari was denied for failure to comply with Rule 39, A. R. App. P.

The totality of any mention of federal authority, however slight, is revealing.

Attention is invited to Appendices B and C, which present significant pages from the Briefs of Petitioner, submitted to the Court of Civil Appeals of Alabama. The TABLE OF AUTHORITIES, in Brief of Appellee, shows that no federal case or statute appeared in the Brief. (App. B at 5, 6) The STATEMENT OF THE ISSUES demonstrate that the two issues argued by Petitioner were: "I. Was there sufficient evidence to support the court's order not granting the custody petition of the paternal aunt and uncle? and II. After remand, was the decision of the trial court in awarding custody to the foster parent so unsupported by the evidence as to be plainly and palpably wrong?" (App. B at 6) There was no mention of any federal authority.

In Petitioner's Brief In Support of Application for Rehearing, the TABLE OF AUTHORITIES contains a single federal citation, 42 U.S.C. § 671(a). Attention is invited to the only place in the brief where 42 U.S.C. § 671(a) appeared:

> "Emphasis was added to the phrase 'placed with a fit and willing relative.' The opinion then sets out the provisions of 42 U.S.C. 671(a) under subsection (19) as follows:

> '(19) provides that the state *shall* consider giving preference to an adult relative over a non-related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant State child protection standards.' (emphasis added in original.) (App. C at 9)
>
> The key words from subsection 19 are 'shall consider.'" *Id.*

The cited quotation is the total of all federal law, case, or statute presented to all of the Courts of the State of Alabama. Petitioner did not raise any federal claim in the Alabama courts and the Alabama Supreme Court did not rule on a federal issue, because Petitioner did not perfect her appeal.

This case is exactly like that in *Webb v. Webb,* 451 U.S. 493, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981), where it was held: "Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction. So ordered." *Webb* at 501-02.

Accordingly, the Petition For Writ Of Certiorari should not be granted in the case *sub judice.*

5. Alabama Courts Are Not Bound By Decisions of Other State Courts.

The first argument of Petitioner in her Petition for Writ Of Certiorari is that the decision of the Court of Civil Appeals of Alabama conflicts with decisions of appellate courts of other states. That argument is irrelevant because

Alabama law requires the Court of Civil Appeals to be governed by the decisions of the Supreme Court of Alabama.[3]

For example, the Court of Civil Appeals of Alabama held in *Howell Lumber v. City of Tuscaloosa,* 757 So.2d 1173, 1181 (Ala. Civ. App. 1997):

> "We note that the city anticipated that Howell Lumber's appeal and its cross-appeal would be heard by our Supreme Court, and not this court; our Supreme Court would have the power to limit or overrule *Reynolds Metals* (*White v. Reynolds Metals Co.* 558 So.2d 373 (Ala. 1989) or *Joyner* (*City of Prattville v. Joyner,* 661 So.2d 1158 (Ala. 1995) in the manner the city seeks. This court does not have the power (see Ala. Code 1975, *12-3-16*), and we are bound to follow *Reynolds Metals* and *Joyner*, both of which are contrary to the City's position." *Id.*

Alabama Supreme Court cases required the Court of Civil Appeals to reach the decision that it did in this case. Appeal from that decision was available to Petitioner. There is no authority for the Court of Civil Appeals to follow the law of any other State, and the citation to holdings of sister states was discussed as informational, not in an attempt to apply the law of any other state. Alabama law was followed in this case, as was the Constitution of Alabama of 1901, Alabama statutes, and holdings

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[3] "The decisions of the Supreme Court shall govern the holding and decisions of the Courts of Appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment *No. 328*." 12-3-16, Ala. Code, 1975.

of the Supreme Court of Alabama and the Court of Civil Appeals of Alabama.

The Petition for Writ of Certiorari should be denied.

6. Federal Law Does Not Confer Any Private Right To Individuals In Custody Disputes.

Petitioner argues that the Adoption Assistance and Child Welfare Act, 42 U.S.C. § 670, does not confer any right on private individuals to enforce its terms. (Pet. Cert. at 17) That act, just as the ASFA, is merely a statute that regulates the terms for providing funds to a state. Respondent agrees that there is no right conferred on any individual by the ASFA. The only remedy for violation of the Acts is the withholding of federal funding from states.

The right to custody of the minor child is not founded upon any federal statute. The custody determination in this case was based upon Alabama law, the recommendation of the Alabama Department of Human Resources, and the evidence and testimony at the trial of the case. Petitioner may not agree with the Alabama law as it exists but there is no right granted unto her by any federal law.

Petitioner does not have any private right under any state or federal law, considering the status of this case at this time. Especially important is the fact that she did not perfect an appeal to the Supreme Court of Alabama. Petitioner's "Questions Presented" is a mere pretext for her argument that it was in the best interest of the child to be in her custody.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

Respondent agrees with the Petitioner that the Adoption and Safe Families Act, 42 U.S.C. §§ 670-679a, does not confer private rights upon competing individuals in a child custody dispute. Respondent contends that this Honorable Court has consistently refused to disturb the decisions of state courts in matters of child custody absent legitimate federal/constitutional issues and is thus without jurisdiction to grant the Petition for Writ of Certiorari in this matter. The Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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APPENDIX A

RULE 39(d), ALABAMA RULES OF APPELLATE PROCEDURE

(d) Form and Length of Petition. The petition shall comply with the provisions of Rule 32(b)(2) governing form and shall not exceed 15 pages (except in capital cases, in which event the petition shall not exceed 20 pages), as also provided in Rule 32(b)(2). The petition shall contain:

(1) The style of the case, the name of the petitioner, the circuit court from which the cause is on appeal, and the name of the court of appeals to which the petition for certiorari is directed;

(2) The date of the decision sought to be reviewed and, if an application for rehearing was filed, the date of the order overruling the application for rehearing;

(3) A concise statement of the grounds, 39(a)(1)(A)-(E), supra, on which the petition is based – and in a death-penalty case a statement in accordance with 39(a)(2)(A) and (B) – provided that:

> (A) When subparagraph (a)(1)(D) is the ground for the petition, the petitioner must quote that part of the opinion of the court of appeals and that part of the prior decision the petitioner alleges are in conflict; or
>
> (B) Where it is not feasible to quote that part of the opinion of the court of appeals either because no wording in the opinion clearly shows the conflict or because no opinion was issued, the petition shall state specifically and with particularity how the decision conflicts with a prior decision;

(4) A copy of the opinion or the unpublished memorandum of the court of appeals, attached to the petition as an exhibit; and

(5) A statement of the facts, if a party is not satisfied with the facts stated in the opinion or the unpublished memorandum of the court of appeals, or if the court of appeals issued a "no-opinion" decision pursuant to Rule 53. The statement of facts shall not be incorporated or adopted by reference from any other document, including the party's brief in support of the petition.

(A) Statement of facts where application for rehearing was filed with court of appeals after an opinion or an unpublished memorandum was issued. If a court of appeals issues an opinion or an unpublished memorandum containing a statement of facts and the party applying for rehearing is not satisfied with that statement, the party applying for rehearing in that court may, in the application, present to the court of appeals an additional or corrected statement of facts or the applicant's own statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, in order for the Supreme Court to consider those facts in addition to the facts as stated in the court of appeals' opinion or unpublished memorandum, the proposed statement of additional or corrected facts or the applicant's own statement of facts presented to the court of appeals in the application for rehearing must be copied verbatim in the statement of facts in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must include a verification that this statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing. If the petitioner does not

present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion or unpublished memorandum.

(B) Statement of facts where an application for rehearing was filed with court of appeals in a "no-opinion" decision or an opinion that does not state the facts. If a court of appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion or unpublished memorandum that does not contain a statement of facts, the applicant shall include in the application for rehearing the applicant's statement of facts. If the court of appeals does not include the applicant's statement of facts in a subsequent opinion or memorandum, a verbatim copy of the applicant's statement of facts as presented to the court of appeals must be included in the petition for the writ of certiorari, with references to the pertinent portions of the clerk's record and the reporter's transcript. The petition must include a verification that the statement of facts is a verbatim copy of the statement presented to the court of appeals in the application for rehearing.

(C) Statement of facts where no application for rehearing was filed with the Court of Civil Appeals. If the petition for a writ of certiorari seeks review of a decision of the Court of Civil Appeals and the petitioner has not filed an application for rehearing with the Court of Civil Appeals, and if the Court of Civil Appeals issues a "no-opinion" affirmance pursuant to Rule 53 or issues an opinion that does not contain a statement of facts, the petitioner shall include in the petition for the writ of certiorari the petitioner's statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the Court of Civil Appeals issues an opinion

containing a statement of facts and the party petitioning for the writ of certiorari is not satisfied with that statement of facts, the petitioner may, in the petition for the writ of certiorari, present to the Supreme Court a proposed additional or corrected statement of facts or the applicant's own statement of facts, with references to the pertinent portions of the clerk's record and the reporter's transcript. If the petitioner does not present in the petition an additional or corrected statement of facts or the petitioner's own statement of facts, it will be presumed that the petitioner is satisfied with the facts as stated in the court of appeals' opinion.

APPENDIX B

THE CIVIL COURT OF APPEALS OF ALABAMA

W.T.M., V.T and E.T.	)	
APPELLANTS	)	
	)	
v.	)	**CASE NO.**
S.P.	)	**2001064/2001065/2001069**
	)	
APPELLEE	)	

ON APPEAL FROM THE JUVENILE COUNT OF JEFFERSON COUNTY, ALABAMA BESSEMER DIVISION

BRIEF OF APPELLEE SHARON PEARSON

ORAL ARGUMENT NOT REQUESTED

* * *

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STATEMENT OF THE ISSUES

I. Was there sufficient evidence to support the court's order not granting the custody petition of the paternal aunt and uncle?

II. After remand, was the decision of the trial court in awarding custody to the foster parent so unsupported by the evidence as to be plainly and palpably wrong?

* * *

APPENDIX C

THE CIVIL COURT OF APPEALS OF ALABAMA

Ex Parte, W.T.M.	)	
W.T.M., V.T and E.T.	)	
APPELLANTS	)	
	)	**CASE NO.**
v.	)	**2001065/2001064/2001069**
S.P.,	)	
	)	
APPELLEE		

ON APPEAL FROM THE JUVENILE COUNT OF JEFFERSON COUNTY, ALABAMA

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING OF APPELLEE SHARON PEARSON

* * *

PARTICULAR POINTS OF LAW OR FACTS THE COURT OVERLOOKED OR MISAPPREHENDED

I. The Court overlooked or misapprehended facts of law in that by reversing the judgment of the juvenile court, the court has gone beyond its standard of review and "reweighed" the evidence in order to determine the "best interest" of the child.

II. The Court overlooked or misapprehended facts of law in that it has added a "relative preference" mandate to §12-15-62 Code of Ala. 1975.

* * *

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Ex parte Bryowsky, 676 So. 2d 1322, 1324 (Ala. 1996) 1

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* * *

notify anyone or question the care of the child. The child was two months old at this time. (R-82) The trial court could have questioned why Ms. Trosch did not intervene in the care of the child at that time.

II. The lead opinion sets out the provisions of §12-15-62(c) Code of Alabama, 1975 as follows:

> "The purpose of the permanency hearing shall be to determined [sic] the permanency plan for the child which may include whether, and, if applicable, when, the child shall be (i) returned to the parent, (ii) placed for adoption wherein the Department of Human Resources shall file a petition for termination of parental rights, or (iii) referred for legal custody. The permanency hearing shall determined whether the plan will include placement in another planned permanent living arrangement in cases where the department has documented to the court a compelling reason for determining that it would not be in the best interests of the child to return home, be referred for termination of parental rights, be placed for adoption, or be *placed with a fit and willing relative*, or with a legal custodian." (Emphasis added.)

Emphasis was added to the phrase "placed with a fit and willing relative." The opinion then sets out the provisions of 42 U.S.C. §671 (a) under subsection (19) as follows:

> "(19) provides that the State *shall consider* giving preference to an adult relative over a non-related caregiver when determining a placement for a [dependent] child, provided that the relative caregiver meets all relevant

State child protection standards." (Emphasis added.)

The key words from subsection 19 are "shall consider."

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